No. 138

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

J. FRANKLIN FORT,
529 Tower Building,
Washington 5, D. C.
Counsel for Respondents.

KOMINERS & FORT,
JOHN CUNNINGHAM,
ISRAEL CONVISSER,
Of Counsel.

August 22, 1959

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 138

UNITED STATES OF AMERICA, *Petitioner*

v.

AMERICAN-FOREIGN STEAMSHIP CORP., ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents named below[1] oppose the petition for certiorari upon the grounds, more fully set forth *infra*, that (1) the narrow issue presented is one of rare, indeed unique, occurrence; (2) contrary to Petitioner's assertion, there is no conflict among the circuits

[1] The decisions of the Court of Appeals for the Second Circuit dealt with fourteen consolidated appeals of twelve appellants, who are respondents here. This brief is filed on behalf of the following eleven of such appellants: Stockard Steamship Corporation; A. H. Bull Steamship Co., et al.; New York and Cuba Mail Steamship Company; Dichmann, Wright & Pugh, Inc.; Polarus Steamship Co., Inc.; A. L. Burbank & Company, Ltd.; T. J. Stevenson & Co., Inc.; North Atlantic and Gulf Steamship Co.; Luckenbach Steamship Company, Inc.; Fall River Navigation Co.; and Blidberg Rothchild Co., Inc.

on this issue; (3) the judgments below are interlocutory; and (4) the decisions of which review is sought are manifestly sound, practical and right. If, however, the petition for certiorari is granted, Respondents seek comprehensive review of the broader issues in accordance with the conditional cross-petition for a writ of certiorari filed concurrently herewith.

OPINIONS BELOW

The relevant opinions and judgments below are set forth in Petitioner's Appendix (hereinafter Pet. App.) pp. 14-50. The opinion of the Court of Appeals, dated July 28, 1958 (Pet. App. 23-44), of which the Government seeks review, and the opinions of the Court of Appeals denying the Government's petition for further hearing *en banc*, dated March 26, 1959 (Pet. App. [illegible]), are reported at 265 F. 2d 136.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

(a) Does a court of appeals sitting *en banc*, consisting of all the active judges of the circuit (except Judge Lumbard who deemed himself disqualified because of association with the litigation during his tenure as United States Attorney), cease to be properly constituted by reason of the retirement of one of the members of the court after submission of briefs by the parties but before publication of the court's opinion; (b) does the retirement of a member of such *en banc* court render him ineligible to participate in the decision of the court even though his retirement oc-

curred after he (1) had sat on the three-judge panel which originally decided the cases; (2) had participated in the decision of the court to grant the petition for reargument *en banc;* and (3) had received and presumably considered the briefs of the parties submitted on the reargument *en banc.*

STATUTES INVOLVED

The statutes involved are:

28 U.S.C. 43(b):

> Each court of appeals shall consist of the circuit judges of the circuit in active service. The circuit justice and justices or judges designated or assigned shall also be competent to sit as judges of the court.

28 U.S.C. 46(c):

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

28 U.S.C. 296:

> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.
>
> Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to

designate permanently a depository of funds or a newspaper for publication of legal notices.

A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

28 U.S.C. 371(b):

Any justice or judge of the United States appointed to hold office during good behavior may retain his office but retire from regular active service after attaining the age of seventy years and after serving at least ten years continuously or otherwise, or after attaining the age of sixty-five years and after serving at least fifteen years continuously or otherwise. He shall, during the remainder of his lifetime, continue to receive the salary of the office. The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice or judge who retires.

STATEMENT

The court below held that Respondents had successfully met Petitioner's jurisdictional attack. The issue is more fully discussed in Respondents' accompanying cross-petition for certiorari. It seems sufficient to state here that Respondents chartered Government owned vessels under a standard form of charter drafted by the United States Maritime Commission.[2] Clause 13.

[2] The Commission and its successor, the Federal Maritime Administration, are sometimes hereinafter referred to as "Maritime".

of the charter[3] made all payments of additional charter hire preliminary and tentative and reserved all disputes until final audit by Maritime of the charterer's accountings. A number of disputes arose between the charterers and Maritime. Nevertheless, pursuant to clause 13 and at the repeated insistence of Maritime,[4]

---

[3] Clause 13 provided in relevent part:

The Charterer agrees to make preliminary payments to the Owner on account of such additional charter hire and on account of any additional charter hire accrued under any War Shipping Administration Form 203 (WARSHIPDEMISEOUT) charter (prior to the times of payment provided for above or in such WARSHIPDEMISEOUT charters) at such times and in such manner and amounts as may be required by the Owner; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment either at the time of the rendition of preliminary statements or upon the completion of each final audit by the Owner, at which times such payments will be made to the Owner as such preliminary statements or final audit may show to be due, or such overpayments refunded to the Charterer as may be required.' (Pet. App. pp. 25-26, n. 3)

[4] To charterers who questioned the amounts asserted by Maritime to be due Maritime wrote letters containing statements of which the following excerpts are illustrative:

(a) Accordingly, it is suggested that you remit the amounts presently established as being due the United States for additional charter hire and promptly take the necessary action to finally resolve with our District Comptroller, the questions relating to the accountings previously approved by him. Your rights to recover any amounts which may be determined by such subsequent action to have been overpaid, are reserved to you in the charter agreement.

Prompt action by your company will avert the placing of a government-wide set-off payment order as contemplated in our letter of December 15, 1954. (Court of Appeals Record pages 109a-110a, hereinafter "C.A. Rec. ....").

(b) From the provisions of Clause 13 quoted in our letter of May 19, 1955, it is evident that situations such as you point out in your letter were anticipated at the time of enter-

the charterers made preliminary and tentative payments on Maritime's theories, as they were required to do by clause 13.[5] When their accountings were audited, Respondents demanded refund of alleged overpayments. Maritime refused their demands and they brought suit. Each libel was filed within two years of Maritime's audit.

---

ing into the contracts, and in view thereof, provisions were placed in the contracts which would require the charterer to pay additional charter hire to the government on a preliminary basis with a further provision for refunding to the charterer of any overpayments resulting from subsequent adjustments.

. . . . .

Therefore, this office would appreciate your remittance to cover the subject invoice with the understanding that if any subsequent action results in credits due your company, the amount of such credits will be promptly refunded. (C.A. Rec. 117a-118a)

To all charterers Maritime sent a circular letter stating:

Where a voucher check is tendered by the Charterer, it is requested that no reference be made thereon through restrictive legend or otherwise to the effect that it is a final settlement. The accompanying letter of transmittal should state that the remittance is *on account* of additional charter hire due the Maritime Administration and is subject to adjustment upon the completion of final accounting between the Charterer and the Maritime Administration and that neither the tender of such payment by the Charterer, nor its acceptance by the Maritime Administration shall be construed as an approval of the correctness of the amount thereof, nor as a waiver of the rights or remedies of either party under the terms of the agreements involved or otherwise. (Pet. App. p. 27, n. 4, C.A. Rec. 163a-164a).

[5] The relevant language is:

The Charterer agrees to make preliminary payments to the Owner . . . at such times in such amounts as may be requested by the Owner.

Petitioner excepted to the libels on jurisdictional grounds,[6] asserting that they were barred by the two year statute of limitations in the Suits in Admiralty Act (46 U.S.C. 745).[7] Petitioner asserted that the statute of limitations began to run from the date of redelivery of the last chartered vessel.[8] Respondents submitted affidavits, other evidence and briefs showing (a) the delay, inherent in the steamship business, in ascertaining operational results and other background reasons for deferring all disputes until final audit, (b) the intent of the parties to defer the disputes, (c) Maritime's repeated insistence upon such deferral, and (d) Maritime's delays in issuing regulations, essential to the settlement of accounts, which made deferral of disputes a practical necessity. (Pet. App. pp. 26-27). Petitioner filed no answering affidavits or other evidence. The court below, sitting *en banc*, held that clause 13 was intended to and did reserve the disputes

---

[6] The district court held that some payments made within two years of the libels were unrecoverable as "voluntary payments", although this question was not raised in Petitioner's exceptions. The court below held that this was not germane to the issue of jurisdiction (Pet. App. p. 28). In any event, tentative payments made under an agreement providing that they are preliminary and recoverable are not "voluntary." 70 C.J.S. secs. 144, 153; *United States v. Ohio Oil Co.*, 163 F. 2d 633, 638 (10 Cir. 1947), *cert. denied*, 333 U.S. 833; *Richfield Oil Corporation* v. *United States*, 248 F. 2d 217 (9 Cir. 1957); *In re N.Y., O. & W.R. Co.*, 178 F. 2d 765, 766 (2 Cir. 1950); *Empire Engineering Co., Inc.* v. *United States*, 59 C. Cls. 904 (1924).

[7] 46 U.S.C. 745 provides in relevant part:

> That suits as herein authorized may be brought only within two years after the cause of action arises . . .

[8] In its briefs on rehearing *en banc* Petitioner argued further that, as to each payment, the statute began to run from the date of payment.

(Pet. App. pp. 29, 31).[9] In doing so it reversed the district court dismissals of Respondents' libels and overruled *Sword Line Inc.* v. *United States*, 228 F. 2d 344 (2 Cir. 1955), *aff'd on rehearing*, 230 F. 2d 75 (1956), cert. denied as to the statute of limitations issue (affirmed as to admiralty jurisdiction) 351 U.S. 976 (1956) and *American Eastern Corp.* v. *United States*, 231 F. 2d 664 (2 Cir. 1956), *cert. denied*, 351 U.S. 983 (1956).[10]

The *en banc* court below also withdrew the earlier opinion by a three-judge panel consisting of Circuit Judges Hincks and Medina and District Judge Leibell. That panel questioned the correctness of the *Sword Line* and *American Eastern* holdings but nevertheless followed them out of considerations of comity as follows:

> If the subject-matter of these appeals were *res nova*, we are by no means sure that our dispositions would coincide with those made by the majority opinion in *Sword Line* and by *American Eastern*. However, we will not overrule these re-

[9] In its brief on rehearing *en banc* Petitioner asserted for the first time that the term "each final audit" in clause 13 referred to each annual audit. The court held that this issue could be tried in the district court "after giving the Government opportunity to raise such issues of fact as may be desired" (Pet. App. pp. 29-30).

[10] As noted below, in *Sword Line* the statute of limitations issue was raised for the first time on appeal. The district court had dismissed the libel because it was barred by a composition in bankruptcy, and as to that point the court was in agreement. Judge Learned Hand, disagreeing with the other members of the panel, was of the opinion that, by reason of clause 13 of the charter, the statute of limitations began to run from the date of final audit, 228 F. 2d at p. 347. In *American Eastern* the Second Circuit relied upon the *Sword Line* holding and, without opinion, affirmed the dismissal of the libel. (Pet. App. p. 28)

> cent decisions of other panels of the court. On the authority of *Sword Line* and *American Eastern* we hold that these libels also were barred. (Pet. App. p. 21)

Because of the doubts expressed by the panel, Respondents petitioned for rehearing *en banc* and their petition was granted (C.A. Rec. 269a). The cases were submitted for decision without oral argument on January 20, 1958 when final briefs were presented. Six weeks later, on March 1, 1958, Judge Medina retired. The *en banc* opinion was dated July 28, 1958.

Petitioner seeks reversal of the decisions below on the narrow ground that Judge Medina, who was concededly eligible, indeed was required by statute,[11] to be a member of the *en banc* court and to participate in the decisional process, was rendered ineligible to complete his work by reason of his retirement prior to announcement of the court's decision.

REASONS FOR DENYING THE WRIT

I. THE ISSUES WERE CORRECTLY DECIDED

A. The Time Bar Issue

The court below properly held that the text of the contract (Clause 13), Respondents' uncontradicted, sworn evidence, and Maritime regulations and letters, supporting Respondents' position, had overcome Petitioner's exceptions, supported only by the unsworn, hearsay *ipse dixit* of Petitioner's counsel. That holding, which Petitioner does not here challenge, gave effect to the agreement of the parties as shown not only by the letter of the contract, but also by the un-

[11] 28 U.S.C. 46(c): . . . A court in banc shall consist of all active circuit judges of the circuit.

contradicted evidence of their intent.[12] The overruling of the jurisdictional exceptions was plainly right.

B. The Issue of Judge Medina's Eligibility

At the outset it should be noted that Petitioner seeks to equate the issue of the eligibility of a retired judge to participate in the decision of a case, which he undertook to hear and determine before retirement, with that of the eligibility of any retired judge (irrespective of whether or not he had been associated with the case involved) to vote on the granting or denial of a petition for reconsideration *en banc* (Pet. App. pp. 8-9).[13]

---

[12] This was in accord with long standing authorities. The agreement was binding and was to be given effect. *United States* v. *Seaboard Air Line Ry. Co.*, 22 F. 2d 113, 115 (4 Cir. 1927); *United States* v. *The South Star*, 115 F. Supp. 102, 106 (S.D.N.Y. 1953), aff'd 210 F. 2d 44. It was to be construed in accordance with the intent of the parties, and, in the case of ambiguity against the drafter. *Hollerbach* v. *United States*, 233 U.S. 165, 172 (1914); *United States* v. *Lennox Metal Manufacturing Co.*, 225 F. 2d 302, 315 (2 Cir. 1955); *American Bemberg Corporation* v. *United States*, 150 F. Supp. 355, 361 (Del. 1957), *aff'd*, 253 F. 2d 691 (3 Cir. 1958), *cert. denied*, 358 U.S. 827. All doubts had to be resolved against the party moving for summary dismissal. *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944); *Conley* v. *Gibson*, 355 U.S. 41, 45-6 (1957); *Richfield Oil Corporation* v. *United States*, 248 F. 2d 217, 225 (9 Cir. 1957); *Dunn* v. *United States*, 1950 A.M.C. 1420, 1421 (S.D. Calif.); *Warner* v. *First National Bank of Minneapolis*, 236 F. 2d 853, 857 (8 Cir. 1956), *cert. denied*, 352 U.S. 927; *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645, 653 (7 Cir. 1957).

[13] The latter is what was involved in the cases cited at pp. 11-12 of the petition. *United States* v. *Silverman*, 248 F. 2d 671 (2 Cir. 1957), *cert. denied*, 355 U.S. 942; *Reardon* v. *California Tanker Co.*, 260 F. 2d 369 (2 Cir. 1958), *cert. denied*, 359 U.S. 926; *Harmar Drive-In Theatre, Inc.* v. *Warner Bros.*, 241 F. 2d 937 (2 Cir. 1957), *cert. denied*, 355 U.S. 824; *United States* v. *Gordon*, 253 F. 2d 177, 191-192 (7 Cir. 1958), rev'd on other grounds, 344 U.S. 314.

The circuits are in disagreement as to the eligibility of a judge who, after retirement, has participated in a three-judge panel, to vote on the granting or denial of a petition for *en banc* reconsideration.[14] But that, obviously, is not the problem now before this Court. There is nothing in the statute that precludes an active judge from deciding a case before him simply because he has retired before the decision is announced.

1. Judge Medina's retirement did not render him ineligible to participate in the decision of the properly constituted en banc court.

Judge Medina was designated and assigned to the *en banc* court to hear and determine the cases at bar. Petitioner, as it must, concedes that he was properly a member of the court when it was constituted.[15] At

---

[14] In *G. H. Miller & Co.* v. *United States*, 260 F. 2d 286, 305-307 (7 Cir. 1955), *cert. denied*, 359 U.S. 907, Judge Schnackenberg in a well reasoned dissent holds that a retired judge, designated to hear a case as a member of a three-judge panel, is, with respect to that case, an active judge within the meaning of 28 U.S.C. 46(c) and is therefore eligible to participate in *en banc* reconsideration of that case.

In *Commercial Nat. Bank in Shreveport* v. *Connolly*, 177 F. 2d 514 (1949), and *United States* v. *Sentinal. Fire Ins. Co.*, 178 F. 2d 217, 219 (1949), both in the Fifth Circuit, Judge Sibley retired after participating in *en banc* decisions. Thereafter he participated in the denial of petitions for further rehearings *en banc*.

In *Bishop* v. *Bishop*, 257 F. 2d 495, 501-502 (3 Cir. 1958), *cert. denied*, 359 U.S. 914, Judge Magruder of the First Circuit sat by designation as a member of a three-judge panel in the Third Circuit. Thereafter he participated in the decision denying rehearing *en banc*.

[15] Under Petitioner's interpretation, if a new judge had been appointed to the circuit, the *en banc* court, which concededly was properly constituted, would have had to be reconstituted to permit him to join in the decision. For the statute states that the *en banc* court "shall consist of *all* active circuit judges". And,

that date he had not yet retired and his inclusion in the court was mandatory under the statute. As a member of the court he had assumed duties which he was required by law to discharge. 28 U.S.C. 296 provides:

> A justice or judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

Failure to participate in the decision would have constituted a breach of his statutory obligation.

It is difficult to perceive any reasonable ground for barring Judge Medina from carrying to conclusion the work thus properly undertaken. There is nothing to indicate any such legislative intent. Indeed the legislative purpose, plainly expressed in a slightly different but none the less analogous context, is that a judge be permitted to complete the work he has begun. Thus 28 U.S.C. 296 further provides:

> A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted

---

if the date of decision were controlling, the vote of the new judge would be required.

But, as was pointed out below, (Pet. App. p. 45), the statute cannot reasonably be read as requiring reconstitution of the court every time a member retires or a new judge is appointed to the circuit. On the contrary, the propriety of the constitution of a court is and, as a matter of practical necessity, must be judged as of the date of constitution.

> to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters.

Neither absence from the district to which he has been designated and assigned nor expiration of his designation and assignment renders a judge ineligible to make or participate in the decision of all matters that were properly before him during the period of his designation. *Frad* v. *Kelly*, 302 U.S. 312, 316-317 (1937); *United States ex rel. Paetau* v. *Watkins*, 164 F. 2d 457, 459-460, n. 1 (2 Cir. 1947).

The principle that a judge remains eligible to complete work properly undertaken is one of long standing. *Cheesman* v. *Hart*, 42 Fed. 98, 105-106 (Colo. 1890); *United States* v. *Garsson*, 291 Fed. 646, 647-648 (S.D.N.Y. 1923); *Hicks* v. *U.S.S.B.E.F. Corp.*, 14 F. 2d 316, 317 (S.D.N.Y. 1926); *Sunrise Mayonnaise* v. *Swift & Co.*, 88 F. Supp. 187, 189 (E.D. Pa. 1949); *United States* v. *Marachowsky*, 213 F. 2d 235, 244 (7 Cir. 1954).

Even the death or physical disability of a judge has not prevented effectuation of his vote and acceptance of his opinion where these were known. In *National Surety Co.* v. *Massachusetts Bonding & Ins. Co.*, 19 F. 2d 448, 453 (2 Cir. May 2, 1927), *cert. denied*, 275 U.S. 548, Circuit Judge Hough was absent from the court at the time of decision. He died shortly thereafter.[16] Nevertheless his concurrence in the result made Judge Manton's opinion, which he had not read, the prevailing opinion over the dissent of Judge Swan.

---

[16] In *Hatch* v. *Morosco Holding Co.*, 19 F. 2d 766, 769 (2 Cir. May 9, 1927), *aff'd*, 279 U.S. 218, decided one week later, he was referred to as the late Circuit Judge Hough.

The principle that a judge must complete his work was given effect (in precisely the same situation as the one at bar) in *Herzog* v. *United States*, 235 F. 2d 664, 670, n. (9 Cir. 1956), *cert. denied*, 352 U.S. 884. There, two judges of an *en banc* court retired shortly before the decision was rendered, and, nevertheless, participated in the decision.

To hold otherwise would frustrate a basic purpose of *en banc* consideration which is to resolve intra-circuit conflicts. *Western P.R. Corp.* v. *Western P.R. Co.*, 345 U.S. 247, 270 (1953; concurring opinion of Mr. Justice Frankfurter). If the vote of the judge who has retired is not decisive, his participation or abstention is not a matter of major significance. It becomes significant only where, as here, the court is deadlocked but for his vote. Thus, contrary to Petitioner's assertion (Pet. p. 8), the upholding of Judge Medina's eligibility is consistent with and effectuates the purpose of the *en banc* procedure.[17]

2. Decision as to Judge Medina's eligibility would not affect the binding force of his vote.

Finally, even if Petitioner's strained and wholly impracticable construction of 28 U.S.C. 46(c) were deemed to have some merit, that still would not call for reversal of the decision below for it would only mean that Judge Medina was a *de facto*, rather than a *de jure*, member of the *en banc* court and his acts would be as binding in the one case as in the other. *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891); *Ex Parte Ward*, 173 U.S. 452, 455, 456 (1899); *Two*

[17] Chief Judge Clark who raised the issue of Judge Medina's eligibility expressed "some personal regret and even doubt as to the ultimate wisdom of the policy" which he felt made Judge Medina ineligible (Pet. App. p. 48).

Guys From Harrison-Allentown, Inc. v. *McGinley*, 266 F. 2d 427, 430-431, n. 1 (3 Cir. 1959).

II. THE NARROW ISSUE PRESENTED IS OF RARE OCCURRENCE AND HAS BEEN UNIFORMLY DECIDED.

The issue posed by the petition for certiorari is one of rare occurrence. And, although perhaps not lacking in academic interest, it is neither of major significance nor sufficiently controversial to warrant review at this interlocutory stage of the proceedings.[18]

Research reveals only two other cases in which the same issue arose, both in the Ninth Circuit. *Herzog* v. *U. S.*, 235 F. 2d 664, 670, n. (1956), *cert. denied* 352 U.S. 884; *In re Sawyer*, 260 F. 2d 189, 203, n. 17 (1958), reversed on other grounds, 27 Law Week 4543. In *Herzog*, Judges Bone and Orr were members of an *en banc* court although they had retired between submission of the case and announcement of the decision. As did Judge Medina below, they participated in the decision. In *Sawyer*, Chief Judge Denman participated in the proceedings of an *en banc* court and retired before announcement of the decision. He did not participate in the decision because, as the report of the case notes, he thought it inappropriate to do so. This was an expression of his individual view, not that of the court. In *Herzog*, on the other hand, in light of the absence

[18] The court below has held merely that the libels are not time barred and Petitioner has not sought certiorari even on this question. The merits have not been reached except in *Dichmann, Wright & Pugh, Inc.* v. *United States*, 144 F. Supp. 922 (S.D.N.Y. 1956), in which Judge Dimock overruled Petitioner's exceptions on the merits and held that the Government had unlawfully exacted additional charter hire in excess of the statutory mandate. Petitioner has not appealed from this decision but has filed time bar exceptions which are now pending in the district court awaiting final action in the instant cases.

of criticism or comment, even from the dissenters, it may be assumed that the participation of the retired judges had the approval of the whole court.

Thus, there is an absence of conflict among the circuits, and the issue is of a low order of urgency since the decision below is the only one in which the vote of the retired judge was decisive in the *en banc* decision.[19]

CONCLUSION

The considerations generally moving this Court to grant petitions for writs of certiorari: importance of the issue; inter-circuit conflict; patent error, are wholly lacking here. The instant petition should, therefore, be denied.

Respectfully submitted,

J. FRANKLIN FORT,
529 Tower Building,
Washington 5, D. C.
Counsel for Respondents.

KOMINERS & FORT,
JOHN CUNNINGHAM,
ISRAEL CONVISSER,
Of Counsel.

August 22, 1959

[19] In *Sawyer* there was no dissent. In *Herzog* the vote was 6 to 3. Neither the participation of Judge Denman nor the abstention of Judges Bone and Orr would have shifted the result in either case.